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**IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990**

**STATE OF OKLAHOMA and
STATE OF TEXAS,**

Plaintiffs,

v.

STATE OF NEW MEXICO,

Defendant.

**EXCEPTIONS OF THE STATE OF TEXAS TO
REPORT OF THE SPECIAL MASTER AND BRIEF
IN SUPPORT OF EXCEPTIONS**

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December 20, 1990

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**TEXAS' EXCEPTIONS TO THE REPORT OF THE
SPECIAL MASTER**

The Court ordered the October 15, 1990, Report of the Special Master filed on November 5, 1990. In these exceptions and in the supporting brief, the Special Master's 1990 Report will be referred to as the Report.

Texas accepts the Report, except for two matters. Texas objects to the recommendation in Section VIII that the Court remand to the Canadian River Commission the issue of whether a portion of the water stored in Ute Reservoir should be exempt from New Mexico's Article IV(b) conservation storage limitation as a desilting pool component of sediment control. Texas also objects to the recommendation in Section V that the Court articulate new procedural prerequisites and guidelines in interstate compact litigation.

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TEXAS' BRIEF IN SUPPORT OF EXCEPTIONS

QUESTIONS PRESENTED

1. Should the Court remand to the Canadian River Commission the issue of whether a portion of the water stored above dead storage in Ute Reservoir should be exempt from New Mexico's Article IV(b) conservation storage limitation as a desilting pool component of sediment control.
2. Should the Court articulate new procedural prerequisites and guidelines for interstate compact litigation.

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JURISDICTION

The original jurisdiction of the Court was invoked under Article III, section 2, clause 2 of the Constitution of the United States and 28 U.S.C. §1251(a)(1).

STATUTE INVOLVED

The Canadian River Compact, 66 Stat. 74 (1952) governs this case. The Compact is included in Appendix A of this brief.

STATEMENT OF THE CASE

The Report accurately summarizes this controversy and correctly recounts the procedural history of the case and the background of the dispute. Report at 1-22. Texas offers one clarification. The Special Master sets out a table reflecting the impact of his recommendations and the parties' contentions as to the amount of stored water in New Mexico allocated to Article IV(b) classifications on June 23, 1988. Report at 111. Some of these figures, including the total conservation storage, are based upon the amount of water impounded in Ute Reservoir on that date. The amount of water impounded, and thus the extent of New Mexico's violation, has been considerably greater on other dates. Report at 17; *see also* Agreed Material Facts F-9 through F-14.

SUMMARY OF ARGUMENT

The Court should reject New Mexico's claimed desilting pool exemption rather than remand that issue to the Canadian River Commission. New Mexico has not shown that a desilting pool serves a legitimate engineering sediment control purpose that would be entitled to exemption under Article II(d) of the Compact. Even if the Compact could be interpreted to exempt such a pool, the record shows conclusively that New Mexico does not have any

present need for a desilting pool. If New Mexico should develop such a need in the future, the Commission could then consider a request for redesignation of the pool pursuant to Paragraph (5) of the Recommended Decree.

The Special Master's recommended prerequisites for judicial relief are unnecessary. The Court already has the means of requiring reasonable efforts to resolve compact disputes when states seek to invoke its original jurisdiction. One state's reluctance to negotiate resolution of a compact dispute should not be allowed to prevent or delay another state's ability to invoke the Court's original jurisdiction. The Special Master's recommendation to restrict review to the record and arguments made before a compact commission would be unduly burdensome on the states. The Canadian River Commission is not a federal agency and is not structured or empowered to function as one. It is important that the record be developed under the neutral control of a Special Master.

ARGUMENT

I.

The Court Should Reject New Mexico's Claimed Desilting Pool Exemption Based on the Existing Record

In Section VIII of his Report, the Special Master recommends that the Court remand to the Canadian River Commission the question whether a portion of the water stored above dead storage¹ in Ute Reservoir should be exempt from New Mexico's Article IV(b) conservation storage limitation as a "desilting pool" component of sediment control. The Special Master acknowledged that the record,

¹Dead storage in Ute Reservoir is the portion of the reservoir below the permanent outlet works at elevation 3725. The claimed desilting pool is water stored between elevations 3725 and 3741.6. See Report at 89-90.

although "sparse," "probably provides an adequate basis for a decision." Report at 99-100. His recommendation that this issue be remanded undoubtedly flows from his proposed prerequisites and guidelines to judicial relief in future interstate compact disputes. These prerequisites are set out in Section V of his Report and are discussed by Texas in its second exception herein. Regardless of the merits of the proposed prerequisites and guidelines, they are inapplicable to this case because the Court has already accepted jurisdiction and should pass on all questions and issues. *See Kentucky v. Indiana*, 281 U.S. 163, 177 (1930).

New Mexico's claim for a desilting pool is based on its assertion that the pool would be needed to protect pumps which may be installed in Ute Reservoir to withdraw water for the proposed Eastern New Mexico Water Supply Project ("Project"). New Mexico's Motion for Summary Judgment at 20. However, the record in this litigation does not establish that a desilting pool is a legitimate engineering component of the sediment control function of Ute Reservoir. The Special Master recognized that nothing in the literature in 1950 or since supports New Mexico's claim that use of a desilting pool in addition to dead storage was a recognized practice encompassed within the concept of "sediment control" in Article II(d) of the Compact. Report at 96. The Special Master further found that the Compact negotiators did not include the concept of a desilting pool in the sediment control exemption. Report at 97. A desilting pool, the Special Master concluded, is "a concept which, however much technical merit New Mexico may believe it has, must be viewed as unprecedented." Report at 99.

Even if the desilting pool concept could be shown to be technically supportable, New Mexico's claim for a desilting pool exemption in Ute Reservoir is premature. The Project for which the desilting pool is claimed does not exist today and the record establishes that there is serious question that it will ever exist. Although the feasibility of the Project has been studied since 1972, it has not been authorized or

funded.² P. Ex. 142 at 1. The amount of water available for the Project has declined and some prospective customers have lost interest in it. Report at 91. Recent cost estimates have substantially increased to \$1,280 per acre-foot of water for a project that would supply 18,400 acre-feet per year, and \$1,640 per acre-foot of water for an alternative down-sized project delivering 10,500 acre-feet per year. P. Ex. 142 at 54-56.³ In light of these problems, Ute Reservoir may never be used as a major municipal and industrial water supply and New Mexico may never need to seek Commission approval for a redesignation of part of its conservation storage as a pool for desilting purposes.

The Special Master, despite making determinations that amply support a decision on the merits, proposes a remand to the Commission because the concept of a desilting pool "may constitute the kind of evolution of reservoir operating concepts which presents an issue of Compact interpretation appropriate for consideration and disposition by the Commission in the first instance." Report at 97. While Texas agrees that the Commission may address evolutionary concepts, New Mexico's claim for an exempt desilting pool should not be taken up by the Commission until the Project is closer to being a reality. Under the current circumstances, a remand to the Commission would only exacerbate and prolong the injury to the downstream states caused by New Mexico's unilateral assertion of this unprecedented exemption.

New Mexico is claiming an exemption for the pool because it is actually being maintained as a minimum pool for recreation purposes pursuant to a contract between the New Mexico Interstate Stream Commission and the New

²Even after authorization and funding, the Bureau of Reclamation estimates that it will require seven years to design and construct the Project. P. Ex. 142 at S-2.

³These Bureau of Reclamation cost estimates assume 100% non-federal financing at 9% interest. P. Ex. 142 at 55.

Mexico Department of Game and Fish. See Report at 90. New Mexico wants to retain the benefit of that recreation pool and still have its full 200,000 acre-feet of conservation storage under Article IV(b) available for determining the feasibility of the Project. New Mexico will continue to use Ute Reservoir for recreation purposes regardless of whether the Project ever becomes a reality. Such recreation use has been very lucrative for the state. See, e.g., P. Exs. 121 - 125. Of course, if the feasibility of the Project is more important than the recreation use of the reservoir, the two New Mexico state agencies can cancel or amend their contract.

The controversy over New Mexico's claimed exemption of the water in this pool began with the commencement of the enlargement of Ute Reservoir in 1982. Report at 19. New Mexico first asserted that the water was exempt as a recreation and sediment control pool. This assertion was the subject of Commission meetings in 1982 and 1983, and was the focus of a 1983 Commission assignment to the Legal Committee to study and report on legal questions arising out of New Mexico's enlargement of Ute Reservoir. Report at 20-21; see also P. Ex. 97AA at 9-10; P. Ex. 98F at 56-62. Texas and Oklahoma, but not New Mexico, prepared and presented reports on these questions at the 1984 Commission meeting. Report at 21; see also P. Ex. 97BB at 5-6; P. Ex. 98G at 36-42. Two months later, New Mexico unilaterally issued operating criteria for Ute Reservoir declaring the water exempt as a desilting pool as well as a recreation pool. Report at 21; see also P. Ex. 81 at 1-2. Unsuccessful efforts to resolve the controversy continued at Commission meetings in 1985, 1986, and 1987. Report at 21-22; see also P. Exs. 97CC, 97DD, 97EE. Throughout all of this controversy, New Mexico has treated the pool as exempt and withheld the water from the downstream states.

The primary function of the Compact is to provide for the equitable division of the waters of the Canadian River by imposing limitations on the allocation of reservoir storage. It is essential to that function that storage allocation

be accomplished through an orderly and equitable procedure such as that set out in Paragraph (5) of the Special Master's Recommended Decree. Under Paragraph (5), the designation or redesignation of storage volumes for purposes exempt from conservation storage chargeability cannot be made unilaterally by a state but must receive Commission approval, which cannot be unreasonably withheld. Report at 113.

Paragraph (5) expresses the Special Master's appropriate concern for preventing unilateral action by a state to exempt reservoir storage. Remand of the desilting pool issue under Paragraph (10) of the Recommended Decree runs counter to this concern by letting New Mexico keep the benefit of its unilaterally declared exemption pending Commission consideration and, as appears likely, ultimate resolution by the Court.

The water in the desilting pool should be classified as conservation storage and charged against New Mexico's Compact allocation until such time as the Commission may determine otherwise. If and when the need arises for New Mexico to utilize Ute Reservoir to serve the Project, it could request a redesignation of storage under Paragraph (5) of the Recommended Decree. The Commission could then consider all relevant factors, including those suggested by the Special Master: the propriety of the desilting pool classification at Ute Reservoir; the appropriate amount of such storage, if any, that should be exempt from Compact chargeability if it is not used solely for desilting purposes; whether such a designation, if appropriate, may be premature; the comparability of storage allocation at Ute Reservoir to that at Lake Meredith; and the views of appropriate federal and state agencies. Report at 100.

A recent order by a Special Master in another original proceeding involving an interstate water compact may be informative and is included herein as Appendix B.

In the Decision of Special Master on Colorado Motion to Stay, *Kansas v. Colorado*, No. 105, Original, Special Master Arthur L. Littleworth denied Defendant's Motion to Stay Based on Kansas' Failure to Exhaust its Administrative Remedies. He ruled that the plaintiff had made reasonable efforts to resolve the dispute at the compact commission level and that remand "would not prove effective, nor would further delay be fair." Special Master Decision, October 21, 1988, in Appendix B at 14.

Summary

The issue whether New Mexico has established a legal right to an exemption under Article II(d) of the Compact for a desilting pool in Ute Reservoir is fully amenable to decision now by the Court. New Mexico was given a full opportunity in the proceedings before the Special Master to establish a legal entitlement to its claimed exemption, but failed to do so. The record demonstrates that the desilting pool concept was not encompassed within the concept of sediment control when the Compact was negotiated and that the Project which allegedly would benefit from the desilting pool will not be a reality for many years, if ever. The record before this Court justifies rejecting New Mexico's claim.

New Mexico may seek a redesignation from the Commission if circumstances change regarding the imminent development of the water supply project. Unless circumstances do change, remanding this issue to the Commission would likely result in an impasse, resolvable only by the Court. See *Texas v. New Mexico*, 462 U.S. 554, 565 (1983).

An upstream state should not get the benefit of a novel claim for exempting water from chargeability under the Compact until that claim is approved by the Commission. New Mexico should not continue to enjoy its *de facto* exemption based upon a claim of a need to desilt water to

protect pumps that do not now exist and are part of a project that may never become a reality.

The Court should hold that the approximately 25,100 acre-feet of water stored in Ute Reservoir in the so-called "desilting pool" is conservation storage subject to New Mexico's Article IV(b) limitation, and it should allow the injuries suffered by the downstream states to be determined and redressed accordingly.⁴ Paragraph (10) of the Recommended Decree should be rejected. The part of Paragraph (6) related to the remand should be modified so that Paragraph (6) reads as follows: "All water currently stored in Ute Reservoir is conservation storage, except water in dead storage below elevation 3725."

II.

The Recommended Prerequisites and Guidelines for Judicial Relief are Unnecessary and Unduly Burdensome

In Section V of his Report, the Special Master recommends that the Supreme Court use the present litigation to articulate jurisdictional prerequisites and procedural guidelines for application in future litigation arising out of interstate compacts.⁵ He recommends requiring the attorney general of a state seeking to invoke the Court's jurisdiction over an interstate compact dispute, or responding to such a request, to certify that the state had negotiated in

⁴It is unclear how the recommended remand would harmonize with Paragraph (9) of the Recommended Decree, which would refer the case to the Special Master for determination of any injury sustained by Plaintiffs and to recommend appropriate relief. The decision on the desilting pool issue will have a significant impact on the extent of Plaintiffs' injury and on appropriate remedies.

⁵The Special Master's recommended prerequisites and guidelines would apparently apply to all interstate compacts, not just to water allocation compacts. Texas has not analyzed the possible impacts on other compacts.

good faith in an attempt to resolve the dispute. Report at 32-33. Texas objects to this recommendation to the extent that it would require a state to make more than reasonable efforts to settle an interstate compact dispute.

The Special Master also recommends that the Court restrict its original and exclusive jurisdiction over interstate compact litigation by limiting review to an "administrative record" compiled by the compact commission, absent good cause shown to adduce additional evidence, and by limiting legal arguments to those presented to the compact commission. Report at 33. Texas objects to these guidelines because they would constitute unnecessary hurdles for states needing relief from compact violations.

States are not required to make more than reasonable efforts to implement compacts and resolve compact disputes

The Special Master appears to be recommending that the Supreme Court require states to make more than reasonable efforts to settle an interstate compact dispute. The Special Master finds that congressional consent to compacts imposes an implied duty that "when states enter into a compact they undertake an implied commitment to make the compact work and to take no affirmative or dilatory action that would frustrate its purpose" and "to participate in good faith in the implementation of the compact plan to carry out its purposes." Report at 30-31. The Special Master further finds that this implied commitment includes a duty to negotiate in good faith to resolve disputes as a condition to invoking the Court's jurisdiction. Report at 31-32. If the Special Master means that Congress, by granting its consent to a compact, implicitly and unilaterally imposed a duty on compacting states to make more than reasonable efforts to resolve disputes, it may be an impermissible encroachment on the Supreme Court's original jurisdiction under Article III of the U.S. Constitution. See *California v. Arizona*, 440 U.S. 59, 65 (1979).

It is unclear whether the Special Master would have imposed a stricter standard upon Texas and Oklahoma than was applied by the Court when it granted Plaintiffs' Motion for Leave to File Complaint in the instant case. In the Special Master's view, the record in this proceeding did not show sufficient negotiation before the Commission of the issues litigated. Report at 34. However, in his "Statement of the Background of the Dispute," the Special Master sets out facts that demonstrate that Texas and Oklahoma did attempt, through the Commission, to resolve all issues except the defenses that New Mexico first raised after the Plaintiffs sought to invoke this Court's jurisdiction. Report at 19-22. The Special Master further acknowledges that:

Texas and Oklahoma . . . sought to resolve their concerns with the enlargement of Ute Dam by negotiations within the Commission rather than immediately seeking to invoke the Court's original jurisdiction, negotiations in which New Mexico appears to have been a reluctant participant.

Report at 37.

Certainly New Mexico's reluctance to negotiate resolution of the disputed issues should not have affected Texas' and Oklahoma's ability to invoke the Court's original jurisdiction in this action. The Plaintiffs' efforts to resolve the dispute at the Commission were set out in their Complaint and Brief in Support of Motion for Leave to File Complaint. Complaint and Brief at 9, 30-31. By granting the motion, the Court implicitly determined that those efforts were adequate. See *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973).

A state benefiting from a compact violation has little incentive to negotiate an end to the violation. If the injured state is required to do more than make a reasonable effort to resolve a dispute, the violating state's bargaining position would be further strengthened. The Special Master

recommends that sanctions be available if the Court finds that a state had not negotiated in good faith. Report at 33. However, the Court can already impose sanctions if it concludes that a state had not made a reasonable effort to resolve a dispute — and it should impose such sanctions on New Mexico in the present case. To be effective, sanctions should be sufficient to remove any economic benefit gained by a state violating a compact.

The Special Master suggests that the requirement of good faith negotiations would serve a function analogous to the doctrine of primary jurisdiction. Report at 32. This doctrine is used to allow an agency to apply expertise to factual issues not within the conventional experience of judges, to allow the exercise of administrative discretion, and to promote uniformity and consistency in a regulatory scheme. *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952). The doctrine is inapplicable here because there are no material factual issues that remain to be decided to resolve the controversy and because the Commission is not administering a regulatory scheme. In addition, the resolution of the disputes in this case does not require unique expertise outside the conventional expertise of judges.

The record and legal arguments should not be restricted to those made before the compact commission

The Special Master suggests that the Court adopt procedures analogous to those used to review federal agency action, and confine its review in compact cases to the record compiled and arguments made in compact commission proceedings. Report at 33. A compact commission, however, is not a federal agency.

No state or federal intent to create a federal agency is shown. The use of interstate compacts is diminished if they create a federal

administrative agency subject to all the ramifications of federal statutes and federal decisions delineating the scope of judicial review of administrative action. As said in *California Tahoe Regional Planning Agency v. Jennings*, 9 Cir., 594 F.2d 181, 190 (1979), cert. denied 444 U.S. 864, the consent of Congress 'did not make applicable to the agreement the entire panoply of *federal* administrative and substantive standards.' [Emphasis in original.]

Special Master's Report and Recommendations, *Texas v. New Mexico*, No. 65, Original, September 10, 1982, ordered filed 459 U.S. 940 (1982).

Unlike a federal agency, the Canadian River Commission does not have the expertise or the experience to handle contested hearings and to decide contested legal issues. The Commission is not a forum where complex legal issues are litigated and where an impartial decision-maker summons witnesses, presides over hearings conducted according to the rules of evidence, renders objective rulings, and compiles formal administrative records.

The Commission has no authority other than that expressed in the Compact. The Compact, designed to be largely self-executing, sets out minimal functions and imposes minimal duties, and does not empower the Commission to conduct formal adjudicative proceedings. The Commission consists of one commissioner from each state and a non-voting federal commissioner. Any action by the Commission requires the unanimous consent of the three state commissioners. There is no mechanism within the Compact to resolve an impasse.

The Canadian River Commissioners, like compact commissioners generally, are different from federal hearings examiners deciding cases for federal agencies. They are

political appointees of various backgrounds and experience who serve the states that appointed them, rather than acting as objective triers-of-fact. See *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 399 (1979).

Given the structure of the Commission and the requirement that action be by unanimous agreement, it is difficult to see how a formal adjudicative record could be compiled on matters over which the Commission was at an impasse. Commissioners unable to agree on the merits of a matter probably could not agree to convene a formal hearing. Even if they convened a hearing, the impasse on the merits would likely be reflected in disagreement on evidentiary rulings and procedural questions.

Another problem with restricting the Court's review to the record compiled by a compact commission is that it would remove the scrutiny of a neutral Special Master from the process of creating and controlling the record. Parties would attempt to submit all remotely favorable material into the record, regardless of the relevance of the material. The Commissioners might not be able to agree to admit any evidence into the record. Conversely, they might agree to admit all offered evidence. In the first scenario, the result would be a useless record; in the second, it would be an unwieldy, cumbersome record containing much extraneous and irrelevant material. Neither record would offer a sound basis for decision.

Furthermore, the Special Master would not have the advantage of assessing the credibility of live witnesses or asking them questions. It is more difficult to understand and appropriately weigh testimony and exhibits from a cold record than from live proceedings. See *Colorado v. New Mexico*, 467 U.S. 310, 326 (1984) (Stevens, J., dissenting).

Limiting the states to the legal theories raised before the compact commission could result in incomplete resolution of disputes and piecemeal litigation. Where

states are before the Supreme Court for the determination of a controversy between them, the Court must pass upon every question essential to such a determination. See *Kentucky v. Indiana*, 281 U.S. 163, 177 (1930).

Summary

The Special Master's recommendations are, commendably, intended to reduce the number of interstate compact disputes requiring resolution by the Court.⁶ Although good faith negotiations could be expected to resolve some compact disputes, the recommendations do not include an effective mechanism for ensuring that good faith negotiations actually take place. As a result, it is more probable that the requirements would serve only to delay resolution of most interstate compact disputes. The recommendations would place additional burdens on states needing relief from compact violations out of proportion to any benefits gained. The best way to reduce litigation over interstate compacts is to deter violations by affording prompt, meaningful, and complete relief to injured states.

CONCLUSION

For the foregoing reasons, the exceptions of the State of Texas to the Report should be sustained. The Court should reject New Mexico's claim for a desilting pool exemption in Ute Reservoir and should classify that pool as conservation storage under Article IV(b) of the Compact. The Court should decline to impose a more rigorous negotiating requirement on states seeking to invoke its original jurisdiction to resolve interstate compact disputes. The Court should also decline to limit the records and arguments in interstate compact actions to those made before

⁶It is conceivable, however, that the recommendations could result in increased litigation involving more minor compact issues. A compact commission unable to reach agreement on a *de minimis* matter might refer it to the Court more readily if creation of a record before a Special Master were not required.

compact commissions. The Court should assess all costs of this litigation against New Mexico as a sanction for failing to make reasonable efforts to resolve this dispute at the Commission level. The Court should adopt the Special Master's Recommended Decree, with the modifications requested on page 8 herein. In all other respects, the Court should adopt the recommendations in the Report.

Respectfully submitted,

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